

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JASON GACOBANO	:	No. 03-CV-1344
	:	
v.	:	
	:	
RAYMOND J. SOBINA et al.	:	

MEMORANDUM OPINION AND ORDER

Rufe, J.

November 24, 2003

Before the Court are Petitioner Jason Gacobano's Objections to Magistrate Judge Thomas J. Rueter's June 24, 2003 Report and Recommendation in the above-captioned case. Gacobano asserts that the Magistrate Judge incorrectly determined that his Petition for Writ of Habeas Corpus was untimely or, alternatively, that the Magistrate Judge erred in not applying the doctrine of equitable tolling to this case. For the following reasons, the Objections are overruled, the Report and Recommendation is approved and adopted, and the Petition is dismissed.

FACTUAL AND PROCEDURAL HISTORY

On August 22, 1996, Gacobano was convicted of rape, involuntary deviate sexual intercourse, burglary, possessing an instrument of a crime, and criminal conspiracy in the Philadelphia County Court of Common Pleas. He was sentenced to fourteen and one-half to fifty years incarceration. Gacobano timely appealed, and on July 21, 1998, the Pennsylvania Superior Court affirmed the judgment of sentence. Gacobano did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On December 14, 1998, Gacobano filed a *pro se* petition under the Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-9546 ("PCRA") in the Philadelphia County Court of Common Pleas. On May 24, 2000, the PCRA court dismissed the petition, and

Gacobano thereafter appealed to the Pennsylvania Superior Court, which on December 19, 2000, dismissed the appeal because Gacobano failed to file a brief.

On March 1, 2001, Gacobano filed his second PCRA petition. On October 26, 2001, the PCRA court dismissed the second petition as untimely because it was not filed within one year of the date on which the judgment became final as required by 42 Pa. Cons. Stat. § 9545. Gacobano thereafter appealed and on October 10, 2002, the Pennsylvania Superior Court affirmed the PCRA court's dismissal order, specifically ruling that the PCRA petition was untimely. Commonwealth v. Gacobano, No. 169 EDA 2002, slip op. at 2-3 (Pa. Super. Ct. Oct. 10, 2002). Gacobano did not file a petition for allowance of appeal with the Pennsylvania Supreme Court.

On January 27, 2003, Gacobano filed the instant Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania. On February 26, 2003, the case was transferred to this Court pursuant to 28 U.S.C. § 2241(d). On April 3, 2003, the case was referred to Magistrate Judge Rueter in accordance with Local Rule 72.1. On June 24, 2003, Magistrate Judge Rueter recommended that the Petition be dismissed as untimely since Gacobano's state conviction became final on August 20, 1998 and, even with statutory tolling from December 14, 1998 through December 19, 2000 (while the first PCRA petition was pending), any habeas petition should have been filed by September 24, 2001. Because the Petition was not filed until January 27, 2003, more than sixteen months late, Magistrate Judge Rueter concluded that it was untimely. In his Report and Recommendation, Magistrate Judge Rueter also noted that Gacobano failed to point to any facts that warranted equitable tolling. On July 7, 2003, Gacobano timely filed Objections to the Report and Recommendation.

DISCUSSION

This Court reviews *de novo* those portions of the Magistrate Judge's Report and Recommendation to which objections have been made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") set a one-year statute of limitations period within which a petitioner may apply for a writ of habeas corpus challenging a state court action. See 28 U.S.C. § 2244(d). Gacobano contends that this one-year period should have been tolled under two of the AEDPA's provisions, § 2244(d)(1) and § 2244(d)(2).

Title 28 U.S.C. § 2244(d), provides in relevant part, as follows:

(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims could have been presented with the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

Gacobano's objection under § 2244(d)(2) must be overruled. It is indisputable that Gacobano failed to seek habeas relief until January 27, 2003. Magistrate Judge Rueter correctly concluded that Gacobano's conviction became final on August 20, 1998, when the time for seeking *allocatur* from the Superior Court's affirmance of the judgment of sentence expired. Although the time for applying for habeas relief was statutorily tolled while Gacobano pursued his first PCRA petition, this tolling ceased on December 19, 2000, upon expiration of the thirty-day period for seeking discretionary review with the Pennsylvania Supreme Court. See Swartz v. Meyer, 204 F.3d 417, 424-25 (3d Cir. 2000).

Magistrate Judge Rueter also correctly concluded that statutory tolling was impermissible from March 1, 2001 through October 19, 2002, during the pendency of the untimely second PCRA petition. See Merritt v. Blaine, 326 F.3d 157, 159 (3d Cir.) (holding that "an untimely application for state post-conviction relief by a petitioner, who sought but was denied application of a statutory exception to the PCRA's time bar, is not 'properly filed'"), cert. denied, ___ U.S. ___, 124 S. Ct. 317, 157 L. Ed. 2d 219 (2003). The AEDPA permits statutory tolling only while a "properly filed" application for post-conviction relief is pending. 28 U.S.C. § 2244(d)(2). "[A]n untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition." Merritt, 326 F.3d at 165 (citing Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2000)). Because the Superior Court concluded that Gacobano's second PCRA petition was

untimely, Magistrate Judge Rueter correctly determined that the second PCRA petition could not toll the federal statute of limitations. Accordingly, the Court overrules this objection.

Gacobano also contends that the Magistrate Judge erroneously concluded that Gacobano failed to allege facts that supported equitable tolling under 28 U.S.C. § 2244(d)(1)(B), (C) and/or (D). He notes that his Reply to the Commonwealth's Response averred that the PCRA court misled him when it advised him of his appellate rights.¹ Specifically, the Reply contained allegations that "[a]t no time was [Gacobano] advised nor could he have reasonably known that following the denial of his first or second state post conviction proceeding he should have filed a Petition for Writ of Habeas Corpus." Petitioner's Reply at 3 n.1. Gacobano claims that he "did as instructed by the State." Objections ¶ 5.

The record reflects that on October 29, 2001, Gacobano was sent, via certified mail, a notice stating the following:

You were sent a 20-day Notice dated 9/27/01, pursuant to Pennsylvania Rule of Criminal Procedure 1507, of the PCRA Court's Intent to Dismiss your PCRA petition. Enclosed is a court order dated 10/26/01, dismissing your petition.

You have thirty (30) days from the date of the order to file a Notice of Appeal to the Superior Court of Pennsylvania. The Notice must be in writing and must be filed at the following address: Active Criminal Records, Criminal Motions Counter, 206 Criminal Justice Center, 1301 Filbert Street, Philadelphia, PA 19107. You must comply with Pennsylvania Rule of Appellate Procedure 906 with respect to Service of the Notice of Appeal. You must serve Judge Fitzgerald with a copy of the Notice of Appeal at 1301 Filbert Street, Suite 1416, Phila., PA. You can file the Notice of Appeal

¹ Gacobano also asserts that the Magistrate Judge failed to consider his Reply to the Commonwealth's Response to the Petition for Writ of Habeas Corpus [Doc. No 12]. The Magistrate Judge was incapable of considering the Reply, dated June 25, 2003 and entered on the docket on June 30, 2003, because it was not received until after the Magistrate Judge issued his Report and Recommendation on June 24, 2003.

on your own or you can hire an attorney.

Notice from Hon. James J. Fitzgerald, dated Oct. 29, 2001.

Gacobano falls well short of establishing that he was actively misled by the PCRA court or that the PCRA court acted in violation of the Constitution. By sending Gacobano the notice, the PCRA court merely complied with the state rules of criminal procedure. Rule 909(B)(7)(b) of the Pennsylvania Rules of Criminal Procedure requires that a PCRA court advise a defendant of “the right to appeal from the final order disposing of [a PCRA] petition, and of the time within which the appeal must be taken” any time that a petition for post-conviction collateral relief is dismissed.²

A statute of limitations “should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice.” United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998). In non-capital cases, “miscalculation, inadequate research, or other mistakes have not been found to rise to the ‘extraordinary’ circumstances required for equitable tolling.” Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2000). Gacobano’s misunderstanding of the tolling rules does not excuse his failure to comply with the AEDPA’s statute of limitations. Because Gacobano failed to show that he was actively misled by the PCRA court or that he was prevented from asserting his federal habeas rights, Magistrate Judge Rueter correctly concluded that equitable tolling is inappropriate in this case.

Finally, Gacobano contends that he was “forced by the state to proceed without counsel nor with the benefit of a record which ultimately resulted in his PCRA appeal being dismissed.” Objections ¶ 5. As Magistrate Judge Rueter noted, Gacobano “has not explicitly

² Effective April 1, 2001, the Pennsylvania Rules of Criminal Procedure were renumbered.

alleged that the availability of the trial transcript prevented him from filing a timely habeas corpus petition. Even if he had, such a claim should be rejected as all of the federal appellate courts which considered this issue have held that the unavailability of the trial transcript does not allow equitable tolling. See Lloyd v. Vannatta, 296 F.3d 630, 634 (7th Cir. 2002) (collecting cases), cert. denied, [537 U.S. 1121 (2003)].” Report and Recommendation at 5. The Court finds that the Magistrate Judge properly analyzed this issue.

CONCLUSION

For the foregoing reasons, the Court overrules Gacobano’s Objections, adopts and approves the Magistrate Judge’s Report and Recommendation, and dismisses as untimely Gacobano’s Petition for a Writ of Habeas Corpus. An appropriate Order follows.

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RAYMOND J. SOBINA et al.	:	

ORDER

AND NOW, this 24th day of November, 2003, it is hereby ORDERED and
DECREED as follows:

- (1) Petitioner Jason Gacobano's Objections to the Report and Recommendation [Doc. No. 13] are OVERRULED;
- (2) Magistrate Judge Thomas J. Rueter's Report and Recommendation dated June 24, 2003 [Doc. No. 11] is APPROVED and ADOPTED;
- (3) The Petition for a Writ of Habeas Corpus is DISMISSED as untimely;
- (4) Because the Petition does not make a substantial showing of the denial of a constitutional right, the Court declines to issue a Certificate of Appealability; and
- (5) The Clerk shall CLOSE this case for statistical purposes.

BY THE COURT:

CYNTHIA M. RUFÉ, J.